# LEGAL ASPECTS OF EMPLOYERS' LIABILITY LAWS

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Law is supposed to be the embodiment of the public sense of justice. Whenever dissatisfaction with a particular law becomes prevalent and there is a general demand that it be changed or abrogated, it is safe to assume that it has ceased to meet the public conception of justice. Such is the case with our common law regulating the liability of employers for the personal injuries sustained by their employees in the course of their employment, namely, the law of negligence as applied to master and servant. It has ceased to satisfy the public conception of justice.

Even though every civilized country in the world, except our own, had not abandoned the system of law which holds the employer liable only when there is a basis of fault, we still would have abundant evidence that it does not meet our own modern industrial requirements. It has been indicted in many states, received a fair and impartial trial by careful investigators and been found wanting. It provides indemnity for but a small portion of the injured workers or the dependents of those who lose their lives. It leaves them to bear not only all the physical pain or mental anguish, but most of the financial loss. Few of those injured receive any pecuniary relief, and most of these but a pittance. Yet the employers are obliged to spend large sums to protect themselves against liability, of which sums the victims reap little benefit. The system affords woefully inadequate and tardy relief to those in need of immediate assistance. It is a fruitful source of antagonism between labor and capital. It is not only wasteful of huge sums paid out in premiums which otherwise might go towards furnishing relief, but also of public moneys which must be expended unnecessarily to sustain an expensive legal machinery. Economists, sociologists, judges, lawyers, legislators, employers and employees all condemn it. Almost twenty years ago a Royal Commission in England in its report characterized it as "an unfair law, operating op-

pressively against workmen as a class." Largely upon the strength of that report England adopted its first Workmen's Compensation Act, providing for the payment of damages by employers in hazardous occupations for all accidents regardless of negligence, of which Lord Salisbury said: "To my mind the great attraction of this bill is that it will turn out to be a great machinery for the saving of life."

Thirty years ago the Germans discarded the principle of negligence and with true statesmanship adopted a system providing for general indemnity practically without regard to the fault of either employer or employee. They have all recognized the principle that all or most of the trade risk should fall upon the industry as represented by the employer rather than on the workman. It is, to say the least, an anomaly, that of all the civilized countries the United States, with all its boast of progress, enlightenment and advanced ideas of justice and humanity, should cling to a system branded abroad as inadequate, if not inhuman. Yet, in making the change, these foreign governments have not been animated so much by sentiments of benevolence as by the conviction that the old system was economically unsound.

We, ourselves, have not adhered strictly to the common law. The changed and complicated conditions of modern industry have impelled many of our states to modify, some to abolish, the fellow servant rule; others to change the rule as to assumption of risk, and either to shift the burden of proof of contributory negligence or to adopt the rule of comparative negligence, where both are at fault. They have sought to impose a more stringent liability upon the employer, and to increase the workman's chances of recovery. But all competent to judge appreciate that but a partial solution of the problem lies in this direction; that it can never be satisfactorily solved through the medium of the old law; that if we are to adopt the principle that the cost of industrial accident shall fall upon the industry, we must in some direct or indirect manner provide for certain universal compensation, either through a general or limited workman's compensation act or through a system of compulsory insurance. In either case, the burden must fall on the employer. He is better able to bear it, and can if he will pass it on by an increased price of his commodity or service. He must be compelled to pay the workman or his dependents directly the scale of

compensation fixed by the act, or must contribute the major part of the insurance fund, without regard to whether he was at fault or whether the accident arose from an inherent hazard of the trade through no negligence or fault on his part.

And here we meet the great constitutional difficulty. The Constitution of the United States provides that no man shall be "deprived of life, liberty or property without due process of law." The courts declare that to hold a man when he is not at fault liable in damages for injuries sustained by another is equivalent to a deprivation of liberty and property. He cannot be so deprived unless the deprivation can be sustained under that broad principle so deeply imbedded in our jurisprudence and now so frequently invoked to overcome some apparently constitutional difficulty, namely, the police power.

Here are some phases of the problem. Will the police power sustain a general compensation act, or will it uphold one of a limited scope? If neither, can we secure one through indirection by inferring from his failure to assert his constitutional right, that the employer has agreed to some general scheme of compensation, or can we, by depriving him of all his common law defenses, drive him into an agreement with his workmen for compensation? Or can we put in force some scheme of insurance assuring the workman certain indemnity against accident? Or will it on the whole be wise to ignore all question of law and remedy and trust to the voluntary action and benevolence of employers?

The bolder spirits typified by the Committee of the National Civic Federation believe that the police power will sustain a general statute covering all or nearly all occupations where the fact of the accident will be sufficiently indicative of the inherent danger. They have proposed such a statute for general adoption. It has, I believe, already been adopted in one state, Kansas. New York, with greater caution, has deemed that the police power would not extend beyond the obviously dangerous or extra hazardous trades. So we adopted an act applying to a particular classification of dangerous industries. Wisconsin, with even greater caution, has not relied on the police power, but proposes an act providing that unless employers or employees declare in writing to the contrary, the contract of employment will be deemed to embody general compensation. While New Jersey, after smiting the employer by knocking out the

props of the fellow servant and assumption of risk rules, adopts in addition the Wisconsin method. Ohio is about to attempt a plan of insurance.

And now, after all the legal talent at the command of the various commissions and committees have ventured their views upon the constitutional perplexities involved, the Court of Appeals of our state has defined the constitutional rights of the employer to be such that no straight workman's compensation act can be enacted by us that does not violate the fourteenth amendment to the Constitution of the United States and the similar provision of our own state constitution. (*Ives* vs. *South Buffalo Railway Co.*)

It is putting it mildy to say that the decision of our court is a crushing blow to workman's compensation. The confident expectation of those who have taken part in this great movement that what has been accomplished abroad could also be realized here, has been turned to doubt and misgiving. If this decision that the police power is not broad enough to overcome the immunity of the property right of the employer under our constitution, is correct, then a similar immunity must exist under the Constitution of the United States. The language of the two constitutions is similar. The interpretation of our court applies equally to both.

My respect for the ultimate tribunal of the co-ordinate branch of our state government is such that I do not feel justified in commenting on this decision beyond saying that it seems inconsistent not only with its own decisions but with the conception of the police power apparently entertained by the Supreme Court of the United States, that it indicates a turning back of the hands of the clock. But our court has declared that the legislative branch has transcended its power. Their word is now the law to which our people and legislature must bow. An enactment which received the almost universal endorsement of the press, the bar, many of our judges and public sentiment generally has been declared unconstitutional. The pity of it is that the court recognizes the need of this reform. It declares that "any plan for the beneficent reformation of this branch of our jurisprudence in which it may be conceded reform is a consummation devoutly to be wished." It in effect declares that our act provides substantial justice but not sound law. The effect of this decision precludes the adoption of any compulsory scheme of compensation, and probably also, of compulsory insur-

ance, for it would probably be equally objectionable to compel the employer, who is without fault, to contribute to an insurance fund. We may, of course, amend the constitution of our state. But this will not remove uncertainty. We will then still have to face the effect of the limitation of the United States Constitution. But with such an amendment we could at least bring the question before the Supreme Court. No appeal will lie from the present decision. Even though we could get this law of ours before the Supreme Court in some other action begun in a federal court, the court might hold itself bound by the interpretation of the state court of the limitation imposed by the state constitution operating upon a state statute. Thus, in New York, we cannot expect any direct reform except through the slow process of an amendment to our state constitution, with the federal question still before us. True, it may be possible to achieve the same result through indirect means. We have already modified the Employers' Liability Statute by weakening the employer's defenses and offering him a way out from the increased liability so imposed, by providing that he may contract with his employees for compensation. We may go further in this direction and drive him into offering such an agreement to his workmen. But any such plan can be at best but a makeshift. The workmen of course will favor it, as it will not only preserve the alluring chance of the large verdict, but will vastly increase the cases of possible recovery, as well as provide him with certain compensation. The employer will soon rue it, for the workmen may decline altogether to enter into the agreement, and leave him with his liability overwhelmingly increased. Thus far but one employer has taken advantage of our elective plan. Or we may adopt the other indirect plan of assuming that the employer waives his constitutional rights and agrees to compensation, unless he specifically declares to the contrary. This might accomplish the result. But would not such a plan be open to as serious constitutional doubt as direct workman's compensation, Can a man be deprived of his constitutional rights by an inference that he elects to waive them?

Such indirect plans involve at best a "whipping of the devil around the stump." If they are feasible and will prove effective, what a singular commentary of our constitutional system will be presented! What the constitution prohibits from being done directly can still

be accomplished by indirection. This great economic and legal reform can only be secured through the medium of a quasi constitutional fraud.

A permanent solution can never be secured except through a compulsory compensation act or some reasonable plan of compulsory insurance. The reliance of the vast number of our citizens, possibly a majority of all who are vitally interested in this matter, must rest upon the wisdom, sense of justice and broad constitutional vision of the Supreme Court of the United States. If we are correct in believing that justice and the general welfare require a change from our present system of employers' liability, surely that change must be possible under a national constitution ordained to "establish justice," to "insure domestic tranquillity" and "to promote the general welfare." If it appears to violate the letter of some particular clause in that constitution it must be justified under the police power which that greatest of all courts of law has recently declared "to extend to all the great public needs" and which "may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank* vs. *Haskell, 219 U. S. 104.*

We indulge the strong hope that a statute of some other state may soon be brought for review before that court, and entertain the confident belief that it will be sustained by a court which has also declared "that the law must adapt itself to new conditions of society." (*Holden* vs. *Hardy, 169 U. S. 366.*) Surely a conception of the police powers which have sustained an act taxing one party to guarantee the debts and defaults of another will include the principle upon which a workman's compensation act must rest. A great demand for this reform is sweeping over the country. It will be unfortunate indeed if our fundamental law shall be found so inflexible as not to yield to a demand for a reform, which the statesmanship of every other civilized country has provided. It is safe to say that its progress cannot be stayed by any unfavorable court decision. If the Supreme Court, in its wisdom, finds that proposed system is incompatible with the fundamental law, then the difficulties of securing an amendment to the Constitution of the United States will probably not deter those who believe the reform is necessary. Let none suppose that the advocates of this humane

proposal in New York will be downcast or deterred from further action by the decision of our court. Rather, they will gird their loins for such effort as can only end in a direct, complete and final solution. They are not yet prepared to strike their colors. They have only "just begun to fight."